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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

DAVID ISRAEL NAMER,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the inevitable discovery exception to the exclusionary rule be applied to admit the testimony of witnesses identified as a result of an unlawful search warrant, the purpose of which had been to identify such witnesses but the application for which was made with a reckless disregard for the truth, where at the time of the unconstitutional search the authorities were not in fact actively pursuing any independent lead that would inevitably have led to the discovery of the witnesses.

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David Israel Namer, by his counsel, John R. Martzell, and co-counsel, John Wilson Reed, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming his judgment of conviction.

OPINIONS BELOW

The latest opinion of the Fifth Circuit, affirming the defendant's conviction and finding the evidence introduced against

him not to be tainted by a previous illegal serach, will be reported at 835 F.2d 1084 (5th Cir. 1988); it is reprinted as Appendix A. The order of the district court finding the evidence not to be tainted is unpublished; it is reprinted as Appendix B.

The original opinion of the Fifth Circuit, finding the original search warrant to be illegal and remanding for a hearing on the question of taint resulting from the seizures effected under that warrant, is reported at 680 F.2d 1088 (5th Cir. 1982); it is reprinted as Appendix C.

JURISDICTION

The Fifth Circuit opinion affirming the defendant's conviction is dated January 4, 1988. This petition is timely, coming within 60 days of that opinion. Jurisdiction is present under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

David Israel Namer was a financial advisor doing business in New Orleans as Financial Management Services. For a fee, generally paid in advance, Namer would secure for his clients loan commitments to provide permanent financing for various building projects. Such long term commitments are essential at the outset of a project because the short term lenders who provide the construction financing for a project will generally do so only if the investor has in hand a commitment permanently to finance the project upon the completion of construction.

Three transactions were the basis of an indictment charging David Namer with conspiring to defraud, and defrauding, investors by receiving fees for worthless commitments, through the mails and interstate travel. 18 U.S.C. §§1343, 2314. The first involved Tropic Sales & Development, acting

through Richard Gazie and Terry Ziegler. The second involved Astro Bowling Center, through Louis LaDuke. The third involved Gilmar Marine, through Raymond Smego and Anthony Fiasco. From each set of clients Namer received fees and either actually obtained, in the case of Tropic Sales and Gilmar, or attempted to obtain, in the case of Astro Bowling, a permanent financing commitment from Sinton Service Corporation, a subsidiary of a Texas savings and loan institution. At the time Namer did so, however, Sinton Service was insolvent, and its commitments were worthless.

Namer was convicted of the conspiracy count, convicted of both substantive counts involving Gilmar (Smego/Fiasco), acquitted of both counts involving Tropic Sales (Gazie/Ziegler), and convicted of one substantive count and acquitted of another concerning Astro Bowl (LaDuke). The key evidence

distinguishing the convictions from the acquittals was the testimony from Gazie and Ziegler that on August 2, 1977, they had informed Namer that Sinton was insolvent and that its commitments were worthless. All convictions related to events after that date, and all acquittals to events before that date.

Although there was an acquittal as to Gazie and Ziegler, the parties have recognized, and the courts have agreed, that their testimony was "vital to the convictions." On that circumstance rests this appeal, for, while Louis LaDuke of Astro Bowl filed a complaint with state authorities and Smego/Fiasco of Gilmar filed a complaint with federal authorities, Gazie and Ziegler never initiated any action, civil, criminal, or otherwise, with regard to their transaction with David Namer. Richard Gazie and Terry Ziegler became witnesses only subsequent to,

and defendant contends as a result of, an unlawful search of the defendant's offices.

A. State Investigation.

In 1977, then assistant district attorney Pauline Hardin was in charge of the Economic Crime Unit of the New Orleans district attorney's office. Over a 12 month period, four persons filed complaints with that division against David Namer. One was Louis LaDuke on November 3, 1977. As of that date, no investigative action had been taken with regard to those complaints, including LaDuke's, either by way of witness interviews, document requests, grand jury investigation, or otherwise. On that date, however, the state prosecutor Hardin took the first state investigative step. She personally secured the issuance of a search warrant for the defendant's business. The warrant was strikingly broad, seeking the seizure of the defendant's "complete office records" and it

was premised on the false representation that the defendant was dealing in unregistered securities.

That search warrant was found to be unconstitutional by the Fifth Circuit Court of Appeals. United States v. Namer, 680 F.2d 1088 (5th Cir. 1982), App. C. The warrant's vice was not some mere technicality, but rather the most serious vice of all, factual misrepresentation; and it was not simply factual misrepresentation by a police officer, but rather by an officer of the court, the assistant district attorney Hardin. The court concluded that "the misrepresentation was made, at the least, with reckless disregard for the truth." Id. at 1094. Explaining further, the court wrote:

> The two principal draftsmen [one, Hardin] were attorneys with at least some exposure to the legal and factual intricacies often involved in detecting and prosecuting white collar crime. It is not shown that they acted

> in a hurried fashion. Rather, we presume from the pace of the investigation and the frequency of their conversations with Stansbury [Deputy Commissioner of the Louisiana Securities Commission] that they acted deliberately and that they were aware of the novelty of their legal theory. Given all of the above --... -- we conclude that the members of the Economic Crime Unit proceeded in reckless disregard of the truth when they characterized Stansbury's ad hoc, oral opinion as a "classification" [of Namer's transactions as securities]. The circumstances surrounding the investigation and warrant application permit no other reasonable conclusion.
>
> Id.

Of particular relevance to the taint issues now presented is that the motivation for this bad faith warrant for all the defendant's records was a desire to discover thereby the names of potential witnesses who might be used against the defendant. The architect of the warrant, assistant district attorney Hardin, so wrote:

> The bank records of the corporation and the defendant are necessary to trace the funds which the victims paid to the defendant to show who financially benefited from these illegal activities. It would also be a way of alerting police officials as to other persons who may be the victim of these unregistered securities.... Telephone statements are relevant to determine persons contacted by defendant with regard to his business of selling unregistered securities.... Correspondence would also be relevant to the representations made to potential buyers, the identification of potential buyers, and any discussion as to the exact nature of the security involved.
>
> Govt. Brief, Original Appeal, p. 18.
>
> For each item named in the search warrant there was probable cause to believe that these types of documents would contain direct evidence of the crime or the names and locations of potential witnesses.
>
> Govt. Brief, Original Appeal, p. 21 (emphasis supplied).

The illegal search warrant not only bore fruit, but bore the intended fruit of

identifying potential new witnesses against the defendant. In particular, one of Namer's files identified the insolvent Sinton Service Corporation as the putative lender for the LaDuke transaction, a fact hitherto unknown as to either the LaDuke transaction or any other transaction then under investigation. And more significantly, a file containing a commitment obtained for Tropic Sales from the insolvent Sinton Service Corporation, revealed for the first time the identity of the witnesses, Richard Gazie and Terry Ziegler, who at trial would give the testimony that was "vital to the convictions." App. A-14.

On its original finding that the state search warrant was illegally obtained, the Fifth Circuit remanded the case for further hearings and consideration on the issue whether the trial evidence was tainted by that illegal search, specifically direct-

ing a consideration of inevitable discovery, independent source, attenuation, and harmless error. 680 F.2d at 1097.

B. Federal Exploitation.

On November 28, 1977, three weeks after the search, assistant district attorney Hardin left her position with the New Orleans district attorney's office and was employed as an assistant United States attorney for the Eastern District of Louisiana. Days after she assumed that position, a federal investigation of Namer commenced. An FBI agent, Rollen Powell, after speaking with a federal magistrate concerning one of the original complainants to the district attorney, and after discussing with Hardin the records that had been seized from Namer, spoke with the chief investigator for the district attorney. He sought, but was denied access to, those records and files. Vol. XV, T. 26-27, 46-47.

On February 27, 1977, that roadblock was overcome with the issuance to the district attorney of a federal grand jury subpoena returnable March 2, 1977 for all records relating to David Namer. Upon the receipt of those documents, including both the complaints to the district attorney and the documents seized from Namer, agent Powell immediately went through those documents paper by paper. Vol. XIV, T. 310. He noted the Tropic Sales commitment from Sinton Service Corporation and the names Richard Gazie and Terry Ziegler as the principals. Id. at T. 325, 332, 348. He also particularly noted correspondence relating to a commitment from Sinton Service Corporation for LaDuke. Id. at T. 309. The commitments from Sinton Service were of interest because at about this time an informant told Powell that Sinton's commitments were of questionable value. S.R., p. 4. Armed with the knowledge

of the Sinton Service connection to the LaDuke transaction, Powell then arranged to interview LaDuke who himself was unaware of what institution, if any, had been solicited for a commitment. Vol. XIV, T. 309; Vol. XVIII, T. 127.

At the time of his interview, LaDuke furnished documentation identifying David Namer's bank. A subpoena duces tecum was issued for the bank records, and upon their return, some of the credits and debits to the account were scheduled. Of the many transactions, one showing funds received from Tropic Sales and referencing Sinton Service, confirmed the agent's knowledge from the search warrant materials that Namer had in fact obtained a Sinton Service commitment, presumably worthless, for Richard Gazie and Terry Ziegler. Knowing of the commitment in the search warrant materials, and knowing of the financial records, obtained through

LaDuke whose Sinton Service connection was itself disclosed by those search warrant materials, the agent instructed that Gazie and Ziegler be interviwed.

The intent of the original search warrant was then fulfilled. Gazie and Ziegler became witnesses who testified that in the course of their own transaction with Namer they had advised Namer that Sinton Service was insolvent and its commitments worthless. Hardin, who as an assistant district attorney had confected the illegal search warrant calculated to disclose such witnesses, as an assistant United States attorney prosecuted the case, introduced the testimony of those witnesses, and secured the convictions.

C. Independent Federal Investigation.

Beyond the original state investigation, and the direct federal exploitation thereof, there were two other federal

inquiries of significance for their separate development of the Gilmar Marine (Smego/Fiasco) transaction. The principal one was a Dallas FBI investigation of Sinton Service that began before the search. During this investigation of Sinton, the commitment issued to Namer in favor of Gilmar was discovered, and an interview of a Gilmar agent in Baton Rouge was arranged in February 1978. During that interview it was discovered that an attorney for Gilmar had previously filed a complaint against Namer in January 1978, and had thus initiated a separate FBI inquiry in Pittsburgh.

Agent Powell in New Orleans was thereafter made aware of the Gilmar information coming out of Dallas and Pittsburgh. He obtained that information and assimilated it into his investigation of Namer. S.R., p. 5-6.

D. Lower Court Findings.

The circuit court observed that, "The most intensely disputed issue is whether the Gazie and Ziegler testimony, obviously vital to the convictions... comes within the inevitable discovery exception." App. A-14. That is the heart of the case. Though the court of appeals recognized that the Tropic Sales commitment, and thus Gazie and Ziegler, were in fact first discovered through the illegal warrant, it nevertheless ruled the evidence admissible. It did so through a broad interpretation of the inevitable discovery rule, that entirely eliminated the pre-condition, noted by this Court and observed in other circuits, that the authorities have been actively pursuing at the time of the illegal search those alternate leads by which the evidence might "inevitably" have been discovered. Ignoring that pre-condition, the court concluded:

> Neither Nix nor our precedents mandate that the specific leads to Tropic Sales had to be in place before the illegal state search was conducted. It suffices that triggering data, likely to precipitate further investigation, was known to the authorities with responsibility in the subject investigation.
>
> App. A-20 (emphasis supplied.)

Then, in the guise of an independent source finding (which properly applied requires that the evidence in fact be found independently), it speculated as to how Gazie and Ziegler might inevitably have been discoverd:

> LaDuke's complaint, and his connecting of Sinton with Namer, the Clay [Gilmar] lead from the Dallas FBI office, the complaint to the Pittsburgh FBI office by Gilmar's attorney, and the informant's report to Powell are independent sources -- independent sources which likely would have led to the same information. As such, this evidence qualifies for the independent source exception.
>
> Id. (emphasis supplied).

It then explicitly embraced the inevitable discovery exception:

> The same applies to the inevitable discovery exception. The Supreme Court has not yet provided a specific definition of inevitability... we agree with the commentators that emphasis is on "would" not "might" or "could"....
>
> There were at least two pertinent FBI investigations proceeding simultaneously. The evidence is sufficiently persuasive that the agents ultimately would have examined all obvious Sinton contacts. Once Namer's bank records were displayed, that contact was apparent and routine investigatory procedures could

> and did lead to Gazie and Ziegler.
>
> Id. at App. A-21 (emphasis supplied.)

The court's protestations notwithstanding, what this language reveals is findings of theoretical probability masquerading as factual inevitability.

REASONS FOR GRANTING THE WRIT

The mandate of the exclusionary rule is not only that illegally seized evidence not be used but that it not be used at all, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The rule is absolute unless the government can demonstrate that the evidence at issue came not "by exploitation of that illegality [but] instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471 (1963). That principle is generally applied in the form of three

doctrines recognized by this Court: independent source, Silverthorne Lumber, supra; attenuation, Wong Sun, supra; United States v. Ceccolini, 435 U.S. 268 (1978); and inevitable discovery, Nix v. Williams, 467 U.S. 431 (1984).

This case presents principally the inevitable discovery exception which the Court did not apply until its 1984 Nix decision and for which the Court has yet to provide any full definition.[1] The absence

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[1]Although the courts below also made findings of attenuation and independent source, those were premised on the inevitable discovery conclusion. There was attenuation because there was inevitable discovery, App. A-23; there was independent source in the inevitable discovery sense that those sources "likely would have led to the same information." App. A-20. If inevitable discovery fails, so too do they. As to independent source, the requisite actuality of the independent discovery is in any event lacking on the court's showing of mere likelihood. Further, an attenuation finding is inappropriate given that the discovery of the witnesses was the intent behind the warrant. Compare, United States v. Ceccolini, supra at 435 U.S. 276, n. 4.

of such a full definition by this Court makes this exception particularly susceptible of abuse by speculative and hypothetical theories of inevitability. The dangers that flow from leaving inevitability undefined by further court construction have been noted:

> Fears that application of the exception will have adverse effects -- whether on deterence, or on the integrity of the judicial process generally -- are best addressed by imposing strict limitations on the criteria for judging when discovery by lawful means is to be considered "inevitable." Regrettably, the majority [in Nix] failed to offer any precise formulation of the exception. The standard the court propsed -- that tainted derivative evidence is admissible when the prosecution can establish that the "information" gained would "ultimately or inevitably" have been discovered "by lawful means" -- provides little guidance to trial courts faced with speculative assertions of "inevitability" based on imagined investigations, hypothetical search warrants, and unjustified assumptions about the likelihood that the evidence

> would not have been removed, altered, or destroyed.
>
> Note, The Supreme Court, 1983 Term, 98 Harv.L.Rev. 127 (1984).

This case exemplifies the danger, for the lower courts both abandoned a well-considered limitation on the rule and embarked on findings of inevitability that are speculative and not rooted in fact. In both respects, the court went far beyond Nix.

The lower courts expressly set side the requirement, implicit in the facts of Nix and explicit in the opinions of other circuits, infra, pp. 30-31, that the government demonstrate that, at the time of the illegal search, it was actively pursuing an independent lead which would have led to the discovery of the witnesses. By dispensing with that requirement, the lower courts eliminated the factual and historical bases for the alleged inevitability, and thereby allowed post hoc rationalizations and specula-

tions to justify the admission of otherwise tainted evidence. This stripped down version of the exception seriously reduces the deterrent effect of the underlying exclusionary rule.

In few cases, certainly in few cases of even ordinary complexity, will there not exist some line of inquiry that if pursued would "likely" have led to the disputed evidence. If that alone be sufficient to excuse the primary illegality, then the incentive for the authorities to avoid illegal shortcuts is taken away and the deterrent effect of the exclusionary rule eliminated.

The Fifth Circuit's broad construction goes beyond the factual and theoretical underpinnings of this Court's decision in Nix v. Williams, and conflicts with the decisions of both the 11th Circuit, United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985), and the

Tenth Circuit, United States v. Owens, 782 F.2d 146 (10th Cir. 1986). To resolve these conflicts and to give needed definition and limitation to the inevitable discovery doctrine, this Court should grant certiorari.

A. Nix v. Williams Suggests the Importance of an Independent, Active Line of Investigation at the Time of the Illegality.

In Nix v. Williams, the Court held that evidence of the decedent's body, in fact discovered a result of an unconstitutionally obtained confession, would not be suppressed where the state demonstrated that the body would in any event have shortly been discovered by independent efforts already actively underway. Those efforts involved a highly organized search party already set in motion systematically to search the area where the body was found. The inevitable discovery exception as applied in Nix was thus only a marginal extension of the independent source doctrine. The independent

source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. Nix at 443. (Compare n. 1, supra at p. 20.) The inevitable discovery doctrine, as applied in Nix, simply allowed the admission of evidence that demonstrably was about to be discovered by means independent of the constitutional violation.

The importance of the demonstrated ongoing investigation is revealed by the Court's own factual emphasis that the "body would have been discovered within a short time." Id. at 438 (emphasis in the original). Further, the significance of an actual historical documentation of inevitability, as opposed to speculation about possible alternative lines of inquiry, is underscored by the Court's observation on the burden of proof issue, that "inevitable discovery involves no speculative elements but focuses on demon-

strated historical facts capable of ready verification or impeachment." Id. at 444, n. 5.

The concurring and dissenting opinions emphasized the implicit importance of the ongoing investigation. Justice Stevens noted that the evidence demonstrated "that at the time of the constitutional violation an investigation was already underway which, in the natural and probable course of events would nave soon discovered the body;" he added that the finding was "based on objective evidence concerning the scope of the ongoing investigation." Id. at 457 and n. 8. Justices Brennan and Marshall similarly stressed the factual premises of Nix that the evidence was admissible only because it was demonstrated that "it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional

violation occurred." Id. at 459 (emphasis supplied).

The lower courts ignored the factual premises of Nix, and took no account of the presence there, and the absence here, of an independent line of investigation that was actively pursued at the time of the illegality. They thereby jettisoned the inevitable discovery exception from the foundation in historical fact that insures that the exception is rooted in reality, and not imagination.

B. The Requirement of an Independent, Active Line of Investigation at the Time of the Illegality.

That the factual setting of Nix, active pursuit of an independent lead at the time of the illegality, should be an elemental requirement for the inevitable discovery exception was at an earlier time the ruling of the Fifth Circuit itself. United States v. Brookins, 614 F.2d 1037,

1048 (5th Cir. 1980). It remains the rule today in the Tenth and Eleventh Circuits. United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); United States v. Owens, 782 F.2d 146 (10th Cir. 1986).

The Fifth Circuit reexamined that rule in the wake of Nix, and found it not only consistent with this Court's premises in Nix, but also mandated by the policy consideration in Nix that, while the state should not be put in a worse position, the deterrent effect of the exclusionary rule must not be diluted beyond recognition. Specifically addressing the requirement of an ongoing investigation, the court then wrote of the consequences if that requirement were not adhered to.

> [W]hen the police have not been in active pursuit of an alternate line of investigation that is at a minimum supportable by leads, the general application of the

> inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is "inevitable" in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, the contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule.
>
> United States v. Cherry, 759 F.2d 1196, 1204-1205 (5th Cir. 1985).

The Fifth Circuit at that time supported its conclusion by reference to the facts and

analysis of this Court in Nix. Id. at 1204, n. 10.[2]

Both the Eleventh Circuit and the Tenth Circuit have followed, without modification, the rule that at the time of the illegal search there be active pursuit of an independent line of investigation. In United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), the Eleventh Circuit found that the rule remained valid in light of Nix and should be continued:

> The Supreme Court's recent pronouncement in Nix does not affect this result. In adopting its general statement of the inevitable discovery rule, the Court was not presented with a situation in which the lawful means leading to an "inevitable" discovery had not yet been acquired by the police at the

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[2]Even as it so wrote, however, the Fifth Circuit began to erode this rule by ignoring it when an independent basis for discovery could necessarily only come into being after the primary illegality. Cherry, 759 F.2d at 1207. Compare, United States v. Miller, 666 F.2d 991 (5th Cir. 1982). That circumstance is not present here.

> time the illegal evidence was seized. The search party there was well on its way to uncovering the body when the suspect revealed its precise location. Thus Nix is not inconsistent with the rule in this circuit that the police must possess and be actively pursuing the lawful avenue of discovery when the illegality occurred.
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> 743 F.2d at 847.

The Tenth Circuit in United States v. Owens, 782 F.2d 146 (10th Cir. 1986), has similarly required that there be an independent line of investigation already being pursued when the violation occurred. It was fortified in this conclusion by its observation that, "The Nix v. Williams opinion emphasized the necessity of an independent investigation by delineating the close connection between the independent

source rule and the inevitable discovery exception." 782 F.2d at 152.[3]

A requirement that the authorities be actively investigating an alternate lead at the time of the illegality, provides a clear factual record for assessing inevitability in real historical terms. It thereby both provides protection for actual good police work actively pursued, and ensures that the deterrent effect of the exclusionary rule is not destroyed by a ready acceptance of

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[3]The Eighth Circuit has applied inevitable discovery where there was active pursuit, though without discussion of the issue. United States v. Apker, 705 F.2d 293 (8th Cir. 1983), cert. denied, 466 U.S. 950 (1984). The Second Circuit has not explicitly held that the element should be required, but has acknowledged its importance and found it present in applying the inevitable discovery exception. United States v. Pimentel, 810 F.2d 366 (2nd Cir. 1987). Two other circuits have applied the inevitable discovery exception without regard to the requirement that there be an independently pursued lead at the time of the illegality. United States v. Merriweather, 777 F.2d 503 (9th Cir. 1985), cert. denied, 106 S.Ct. 1497 (1986); United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987).

theories of inevitability based on ways the evidence might have been obtained that no one bothered to pursue.

C. The Standardlessness that Results When the Requirement is Dropped.

The circuit court expressly rejected the principle "that the specific leads to Tropic Sales [Gazie-Ziegler] had to be in place before the illegal state search was conducted." The result is a finding of inevitability that is not based on actual facts, that dilutes the meaning of "inevitability" as that term was understood in Nix, and that eliminates the capacity to test the actual inevitability by reference to reality.

The court essentially embraces a "post hoc conjecture by the prosecution buttressed by police testimony as to what investigators would have done and would have achieved." Note, supra, 98 Harv. L.Rev. at

129. The problem is that "Such avowals are easily made, yet particularly difficult to rebut persuasively." Id.[4] The force of the exclusionary rule is diminished by a too ready access to an inevitability scenario.

Observing that a definition of "inevitability is not without difficulty," the lower court neverthless applied one that mutates "inevitability" to "probability." It thus wrote:

> It suffices that triggering data likely to precipitate further investigation, was known to the authorities with responsibility in the subject investigation. [The foregoing are] independent sources which likely would have led to the same information.
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> * * *
>
> There were at least two pertinent FBI investigations proceeding simultaneously. The evidence is

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[4]The record demonstrates that problem. Agent Powell, confronted with a taint hearing, notably changed his testimony from 1980, when he emphasized the importance of the seized Tropic Sales commitment to his decision to interview Gazie and Ziegler.

> sufficiently persuasive that the agents ultimately would have examined all obvious Sinton contacts.
>
> App. A-20 - A-22.

The stuff of which these findings are made, however, bears no relation to the actual inevitability of the discovery of the body in Nix.

One may concede that there were two FBI investigations (although there was only one, the Sinton Service investigation, at the time of the illegal search), and that these kinds of investigations often involve examination of bank records. Nevertheless to say that the Gazie/Ziegler transaction would inevitably have been discovered assumes that the FBI has not only the diligence but the motivation, as a matter of routine, to find a needle in a haystack. There were, after all, only four probable sources for acquiring knowledge about the Gazie/Ziegler transaction.

First were Gazie and Ziegler themselves, but they never came forward. Second was the Sinton Service records, but the evaluation of those records led initially only to the Gilmar (Smego/Fiasco) transaction and not to the Tropic Sales transaction. Third were Namer's own records, but those were illegally seized. Fourth were the bank entries, but they yielded information only to an eye practiced by its pre-existing awareness of the significance of Tropic Sales. Whether those entries would otherwise have been noted is pure speculation. Absent the illegal search, the discovery of Gazie and Ziegler was more likely to be serendipitous than inevitable.

A kindly indulgence of the inevitability of finding otherwise tainted evidence will always spare the prosecution the consequences of an illegal search, but it carries a price in foregone deterrence. That

price is particularly unwarranted where the illegal action was not that of the mere constable but of the prosecuting authority itself. Here, prosecutors, who intentionally sought and obtained the names of witnesses by bad faith representations in support of a search warrant, are nevertheless permitted to present the testimony of those witnesses by a finding of inevitability that devalues the word.

CONCLUSION

This Court should grant certiorari in order further to define the standards and limitations of the inevitable discovery doctrine, to resolve conflicting views of that doctrine among the circuits, and ultimately to ensure that the doctrine is applied in a principled way.

Respectfully submitted,

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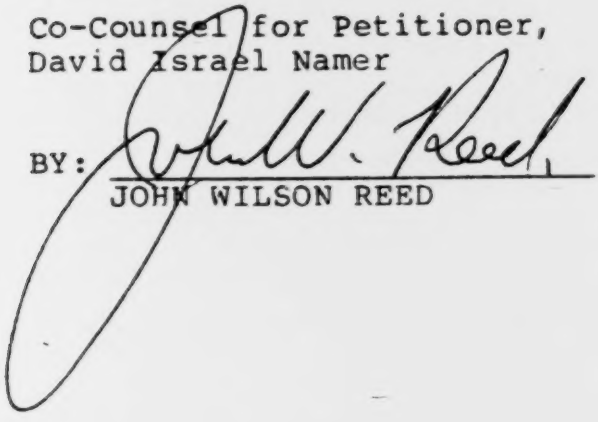
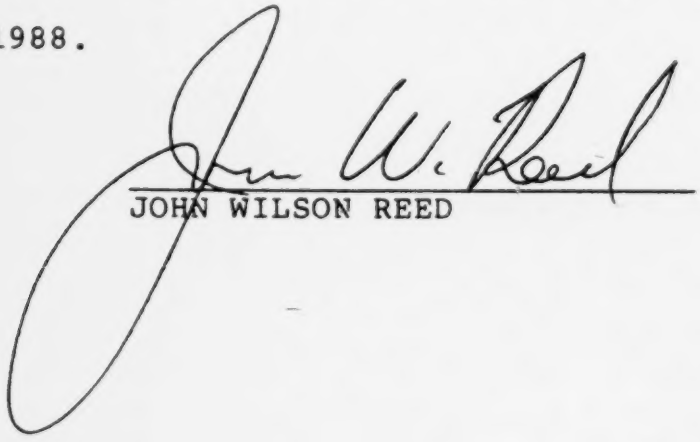
BY: 
JOHN WILSON REED

CERTIFICATE OF SERVICE

I, John Wilson Reed, a member of the bar of this Court, hereby certify that copies of this petition for certiorari have been served on respondent, United States of America, by mailing three copies thereof, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, and three copies to John Volz, Esq., U.S. Attorney, 500 Camp Street, New Orleans, LA 70130, this 18th day of February, 1988.



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